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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W.R. GRACE & COMPANY and KOOTENAI DEVELOPMENT CORPORATION, Defendants.	Civ. No. CV-00-167-M-DWM **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR AN ORDER IN AID OF IMMEDIATE ACCESS OR IN THE ALTERNATIVE FOR AN EXPEDITED HEARING**

Kootenai Development Corporation ("KDC") and W.R. Grace & Company ("Grace"), through undersigned counsel, submit the following response to the United States Environmental Protection Agency ("EPA")'s Motion for an Order in Aid of Immediate Access or in the Alternative for an Expedited Hearing.

I. INTRODUCTION

EPA has filed this action, ostensibly seeking access under Section 104 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), to commandeer private property to serve as a disposal site for EPA-generated materials, thereby exceeding its statutory authority. EPA seeks, *inter alia*, to permanently dispose of contaminated waste on KDC's land via a series of so-called "access agreements," all of which are impermissibly vague as to the location and scope of EPA's planned activities.

EPA's access demands can be broken down into three categories: (1) access to sample and perform other investigation activities; (2) "access" to use KDC's property as a permanent disposal site for contaminated waste generated from EPA response actions at other properties; and (3) access to take other undefined response actions. KDC has already granted EPA wide access to its property to take samples, drill holes, install monitoring wells, and other actions needed to investigate possible contamination and to assess the need for a response action. Therefore, only EPA's two other demands remain in dispute. These demands, however, exceed EPA's authority.

Despite the fact that EPA's remaining demands exceed its statutory authority, KDC has not refused to entertain them. Instead, KDC has simply requested that EPA discuss with it the following before EPA dumps waste on its property: (1) precisely what EPA plans to do and where; (2) protection against potential liabilities caused by EPA activity; and (3) just compensation for the use of and damage to KDC's land. Curiously, EPA has refused all offers to negotiate a mutually satisfactory agreement and has, instead, enlisted the aid of this Court to exceed its authority under CERCLA § 104(e) and act in an arbitrary and capricious manner.

II. FACTS

A. The Screening Facility.

Since the summer of this year, EPA has performed excavations, demolition, and other activities at a former vermiculite processing facility known either as the Screening Facility or the Screening Plant. The Screening Facility is owned by Mel and Lerah Parker and is situated on approximately 20 acres between the Kootenai River and Highway 37 in Libby, Montana.

B. KDC's Property In and Around Libby, Montana.

EPA has sought access for a variety of purposes to all of KDC's properties, warranting a brief description of those properties. KDC owns three separate properties in and around Libby, Montana. First, KDC owns approximately 3600 acres associated with a former vermiculite mine approximately seven miles northeast of Libby (the "Mine Site"). The Mine Site is not adjacent to the Parkers' Screening Facility. The majority of the Mine Site is not associated with mining activities or in any other aspect of the vermiculite business. In fact, only about 1200 acres have been subject to a Montana mined land permit and reclamation bond. When KDC purchased the Mine Site in 1994, reclamation had been completed on all but approximately 120 acres of the property. At that time the permit was transferred to KDC who, jointly with Grace, has participated in reclamation activities overseen by Montana's Department of Environmental Quality. (Ex. J ¶ 2(a)).

KDC also owns a parcel of land, approximately 20 acres, located between Highway 37 and the Kootenai River (the "Kootenai Flyway"). The Kootenai Flyway is located up river from and adjacent to the Screening Facility. (Ex. J ¶ 2(b)).

Finally, KDC owns a parcel of land, approximately 42 acres, on the bank of the Kootenai River opposite from the Screening Facility, known as the "Bluffs." Located on the Bluffs is quarter-acre railroad loading area associated with past vermiculite processing operations. There

are also two old stockpile areas, each one-half to one acre in size, associated with the former vermiculite loading activities. (Ex. J ¶ 2(c)).

C. KDC's Prior Negotiations with EPA.

In November 1999, Paul Peronard, an EPA environmental engineer assigned to the Libby, Montana cleanup, approached Mark Owens, then-President and majority shareholder of KDC. Mr. Peronard was interested in access to KDC's properties, in particular the Mine Site, for soil sampling, analysis, and other investigatory activities. (Ex. J ¶ 3).

Over the next eight months, Mr. Owens granted numerous EPA requests for access to KDC property to conduct investigation. Typically, an EPA representative would contact Mr. Owens with an access request for a specific date and time. Representatives of KDC or Grace often accompanied EPA officials during their investigations. (Ex. J ¶ 4). KDC never granted access to its properties for either waste disposal or response activities other than investigation, and the access it did grant was not permanent. (Ex. J ¶ 5).

During the Spring of 2000, Mr. Peronard first discussed with Mr. Owens EPA's interest in using the Mine Site for disposal of remediation wastes from the Screening Facility and other properties. EPA and KDC discussed several different possible locations for waste disposal, but agreed on none. (Ex. J ¶ 6).

In one discussion, Mr. Peronard told Mr. Owens that EPA would eventually turn its focus to the Mine Site and that related costs could run into the millions. Mr. Peronard made it clear that EPA would look to others to pay those costs, but that EPA could provide KDC with liability protection if it cooperated with EPA's demands. (Ex. J ¶ 7).

Matt Cohen, EPA's attorney, subsequently contacted KDC's attorney to further discuss EPA's demands. In an odd twist, Mr. Cohen stated that EPA would provide KDC a liability release and a covenant not to sue if KDC allowed EPA to dispose waste on its property and give

EPA 25% of the net proceeds of any real estate KDC sold. The terms of this proposal were not finalized or agreed to by KDC. (Ex. J ¶ 8).

Throughout this negotiation, Mr. Peronard and Mr. Owens engaged in general discussion regarding cleanup activities on KDC property, but never reached any specifics. KDC did not grant – and EPA never requested – oral or written access for EPA to conduct cleanup activities on any KDC property. (Ex. J ¶ 9).

D. The July 19, 2000 Proposed Access Agreement.

On July 19, 2000, EPA sent to David Cleary, an in-house attorney at Grace, an "access agreement," a copy of which is attached as Exhibit A. The document demanded that Mr. Cleary, apparently as the property owner, grant EPA entry and "access" to land described as "[the f]ormer mining location outside Libby, Montana formerly known as Zonolite Mountain and all other properties owned by Kootenai Development Corporation, which are now owned by W.R. Grace & Co." (Ex. A). Such property does not exist; neither Mr. Cleary nor Grace own property formerly owned by KDC.[1]

In the July 19 proposed agreement, EPA demanded "continued access" to this hypothetical property – presumably in perpetuity – for all of the following purposes:

1. The taking of such soil, water, and air samples as may be determined to be necessary;
2. The sampling of any solids or liquids stored or disposed of onsite;
3. The drilling of holes and installation of monitoring wells for subsurface investigation;
4. Other actions related to investigating surface or subsurface contamination;
5. **Disposal of waste from EPA's response action(s) at the Screening Plant [located in the town of Libby, Montana];**
6. The taking of a response action, including site stabilization, construction of a fence, the removal of hazardous materials and substances, material containment, and other actions deemed necessary to protect human health and the environment.

[1] Although Grace is a KDC shareholder, KDC has conveyed no property to Grace and remains the sole owner of the land at issue.

(Ex. A) (emphasis added). EPA stated that the proposed agreement was "non-negotiable," and demanded a response within 24 hours.

KDC responded the next day. Not surprisingly, KDC declined to grant EPA unlimited access and the right to dispose of waste on any property owned by KDC or Grace. It noted that EPA had acted outside its statutory authority but stated that it "would be willing to discuss a fair and lawful access and disposal agreement for the property owned by KDC . . . ." (Ex. B, p. 2). KDC also stated that it is "open to discuss[ing] the specific terms that would be appropriate and reasonable for such an access and disposal agreement under these present circumstances , . . ." (Ex. B). KDC requested that such terms include a precise description of the properties EPA plans to enter, a description of the specific activities, just compensation and liability protection from EPA's disposal activities on KDC's property. See Ex. B.

E. The Three August 3, 2000 Proposed Agreements.

EPA responded on August 3, 2000 by sending to "David Cleary, for W.R. Grace & Co.," three additional proposed access agreements. (Ex. C). Two of the proposed agreements contained the following confusing property definition:

> Former mining location outside of Libby, Montana formerly known as Zonolite Mountain and/or Vermiculite Mountain owned or formerly owned by Kootenai Development Corporation and/or others, which is now owned and/or controlled by W.R. Grace & Co.

(Ex. C). The third purported to apply to property defined as:

> All property owned or formerly owned by Kootenai Development Corporation and/or others, which is now owned and/or controlled by W.R. Grace & Co., located on or near the Screening Plant area of the Libby Asbestos Site (BC), as shown on the attached map.

(Ex. C). The extremely broad scope of EPA's planned activity remained the same: one access agreement contained precisely the same provisions as the July 19, 2000 agreement, and the other two contained five provisions out of the previous six.

F. KDC Granted EPA Access by Executing Five Access Agreements.

On August 8, 2000, KDC executed its first written access agreement permitting EPA to conduct investigation activities at the Mine Site. (Ex. D). This agreement was similar to the third August 3, 2000 agreement proposed by EPA, with a few corrections. First, KDC removed all mention of Grace because KDC is the sole property owner. Second, KDC narrowed the property definition to clearly apply only to the Mine Site. Third, KDC struck the portion granting complete access for "[t]he taking of a response action," because EPA has not yet made a determination that a response action other than investigation is necessary at the Mine Site. Finally, the agreement contains an August 28, 2000 expiration date because the parties were engaged in global settlement discussions at the time. See (Ex. D). EPA and KDC agreed that an expiration date would provide everyone with additional incentive to reach a mutually acceptable agreement.

On August 14, 2000, KDC executed and provided EPA with two additional access agreements to provide EPA access to the other KDC properties for investigation and oversight of Grace's activities at the Mine Site. As with the August 8 agreement, these agreements were similar to the other two agreements contained in EPA's August 3 proposal. KDC focused the property definitions,[2] made clear that it and not Grace owned the land, deleted the provisions allowing for disposal of contaminated wastes and the right to take yet-to-be-determined response actions, and included an August 28, 2000, expiration date. (Ex. E).

When those access agreements expired, KDC promptly provided EPA with two access agreements without expiration dates, granting EPA continued access to its property for authorized activity. (Ex. F).

On September 12, 2000, KDC sent EPA a letter reiterating that "KDC is not opposed to granting EPA access to its property" once KDC and EPA worked out reasonable terms. (Ex. H).

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[2] One access agreement pertained to the Mine Site, the other to the Bluffs.

Two days later, EPA filed this action.

III. ARGUMENT

As the Court's September 18, 2000 Order states, EPA must satisfy five statutory prerequisites before it can compel KDC to comply with its demands: (1) EPA must seek entry pursuant to CERCLA § 104(e)(2-4); (2) KDC must have obstructed its right of entry; (3) EPA must have a reasonable basis to believe there may have been a release from the site; (4) EPA must have sought KDC's consent; and (5) the entry demand must not be arbitrary and capricious, an abuse of discretion, or otherwise unlawful.

The Order requests a response from KDC regarding the second, fourth, and fifth requirements. For the purposes of this motion only, KDC does not contest the fourth requirement.[3] EPA however, has failed to meet both the second and fifth requirements. In addition, KDC respectfully submits that EPA has not met the first requirement.[4]

A. EPA's Demand for Entry Is Arbitrary and Capricious, an Abuse of Discretion, and Otherwise in Violation of Law.

As EPA admits in its brief in support of its motion, KDC has already granted EPA access for sampling, investigation, and oversight. (Pl.'s Memo. of Law, p. 4, n.2). EPA, however, asks this Court to enforce "access" allowing it to dispose of contaminated waste on KDC's property and to conduct a response action even though it has yet to determine the need for a response action on KDC's property. To compel compliance, EPA must prove that this demand for "entry" is not arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. It cannot.

EPA devotes only a single paragraph to this requirement and proffers an incorrect standard of review, stating that the Court can only review whether EPA's release determination is arbitrary and capricious. (Pl.'s Memo. of Law, p. 14). As the Court's order notes, however, the

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[3] EPA, however, has not yet made a formal request of KDC.

[4] KDC and Grace expressly reserve the right to argue that EPA has not met the third requirement.

Court can and must review whether EPA's ***demand for entry*** is arbitrary and capricious, an abuse of discretion, or otherwise unlawful. Accord 42 U.S.C. § 9604(e)(5)(B)(i); United States v. Tarkowski, No. 99 C 7308, 2000 U.S. Dist. LEXIS 7393, at *7-8 (N.D. Ill. May 25, 2000) (citation omitted) (attached as Exhibit L):

> Though the government maintains that the Court lacks the authority to review what it refers to in its second motion as "EPA's planned removal action," the government has all along conceded that the Court does have the authority to determine -- indeed that it must determine -- whether the EPA's request for access is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. That inquiry necessarily requires the Court to examine the nature of the government's planned actions in the context of the particular case.

EPA has failed to meet this requirement because: (1) Section 104(e) does not authorize EPA to take private property; (2) EPA's proposed access agreements are impermissibly vague; (3) EPA's entry must be tied to a response action at the location of the release; (4) Section 104(e) allows only for entry "at reasonable times," not permanent, unlimited entry; (5) EPA does not "need" to dispose of contaminated waste on KDC's property; and (6) EPA has not yet determined the necessity of a response action.

1. CERCLA § 104(e) Does Not Authorize the Taking of Private Property.

KDC has already granted EPA entry to investigate and determine the need for a response action. EPA, however, has also demanded KDC allow EPA to dispose of contaminated waste on its private property. Section 104(e) does not grant EPA the authority to take private property and, thus, EPA cannot seek court-ordered compliance.[5] Instead, EPA must act pursuant to Section 104(j), the only CERCLA provision explicitly authorizing EPA to take private property.

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[5] Supreme Court precedent is clear that any permanent physical occupation constitutes a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419. 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (holding installation of 36 feet of cable, two directional taps and two cable boxes constituted a *per se* taking). Permanently disposing contaminated waste is undoubtedly a permanent physical occupation and thus a taking. The EPA, in fact, has recognized this, stating that KDC may have a Tucker Act claim following disposal. (Ex. C , p. 2). It is not clear, however, whether KDC would have a Tucker Act claim if it voluntarily granted EPA access.

EPA contends that CERCLA § 104(e)(3), titled "Entry," allows it to seize private property to dispose of hazardous materials. That section provides:

> Any officer, employee, or representative described in paragraph (1) ***is authorized to enter at reasonable times*** any of the following:
>
> . . . .
>
> (D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

42 U.S.C. § 9604(e)(3) (emphasis added). By its plain terms, Section 104(e)(3) merely allows EPA to enter private property at reasonable times to effectuate a response action. The provision does not authorize the permanent appropriation of private property for the disposal of waste that EPA generated in connection with actions taken at an entirely different property. Significantly, EPA cites no case even suggesting otherwise.

In stark contrast to Subsection (e), CERCLA § 104(j)(1) contains an explicit grant of power, allowing EPA to:

> Acquire, by purchase, lease, condemnation, donation or otherwise, any real property or any interest in real property that [EPA] in [its] discretion determines is needed to conduct a remedial action under this chapter.

By using the terms "purchase, lease, condemnation, [or] donation," Congress acknowledged that the Fifth Amendment to the Constitution requires just compensation for all takings of private property. See U.S. Const., Amend. V. Moreover, the plain language of Section 104(j) indicates that Congress intended for EPA to secure payment for all property acquired *prior to* its acquisition of private property and did not intend for landowners to resort to a claim for compensation after a taking.[6]

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[6] Section 104(j) also allows EPA to acquire land by "donation." Donation, however, connotes a voluntary act. Forcing KDC to grant access, under threat of civil penalty, is not a "donation."

Section 104(j), not Section 104(e), authorizes EPA to take private property. If EPA chooses to acquire KDC's property for contaminated waste disposal, it must act pursuant to Section 104(j). The difference is far more than semantic. Only Congress – not the President or EPA – has the sovereign power of eminent domain. See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function for Congress and Congress alone to determine.") (internal quotations & citations omitted); Berman v. Parker, 348 U.S. 26, 33 75 S. Ct. 98, 99 L. Ed. 2d 27 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."). Therefore, absent a grant of power from Congress, neither the President nor EPA can take private property, even for a public use.

Congress has granted the President, who in turn authorized EPA, to take private property under Section 104(j), and not 104(e). When taking private property, EPA must thus act pursuant to Section 104(j) and its limitations, i.e., EPA must compensate KDC before acquiring its property. Moreover, it appears that Congress may have limited EPA's 104(j) power solely to remedial actions, and not removal actions. If so, EPA cannot take KDC's property without instigating a remedial action. EPA has not done so.

2. EPA's July 19, 2000 and August 3, 2000 Proposed Access Agreements are Impermissibly Vague.

EPA first sent a proposed access agreement to David Cleary, an in-house attorney at Grace, on July 19, 2000. The July 19 proposed agreement stated that Mr. Cleary was the property owner of "[the f]ormer mining location outside Libby, Montana formerly known as Zonolite Mountain and all other properties owned by Kootenai Development Corporation, which are now owned by W.R. Grace & Co." (Ex. A). Neither Mr. Cleary nor Grace, however, owns property formerly owned by KDC. Also, the "address" contains no address, much less boundary

lines or any other detail whatsoever. Instead, the proposed agreement covers a vague "location." (Ex. A). As stated above, the Mine Site above occupies over 3600 acres of which nearly 1200 were at one time subject to mining operations. The proposed access agreement does nothing to identify the particular areas on which EPA desires to undertake its activities.

Not only was the July 19 proposed agreement vague regarding location, but it was also vague regarding the activities for which EPA sought access. The agreement demanded "continued access" for, among other things, "[o]ther actions related to investigating surface or subsurface contamination," waste disposal, and "[t]he taking of a response action, including site stabilization, construction of a fence, the removal of hazardous materials and substances, material containment, and other actions deemed necessary to protect human health and the environment." (Ex. A).

The proposed agreement did not explain what particular response actions EPA was referring to, where EPA would implement these unspecified response actions, the quantity and specific nature of the contaminated waste EPA intended to dispose of, or what "other actions" the EPA might take. As explained above, the majority of KDC's property is not at all associated with mining activities; given that KDC's property spans thousands of acres, it was impossible to tell to what specific actions and locations EPA intended the proposed agreement to apply.

Although EPA attempted to clarify its access request on August 3, 2000, the three proposed access agreements it sent (again to Grace) were also impermissibly vague. Two of the access agreements contained the following "address" of the property at issue:

> Former mining location outside of Libby, Montana formerly known as Zonolite Mountain and/or Vermiculite Mountain owned or formerly owned by Kootenai Development Corporation and/or others, which is now owned and/or controlled by W.R. Grace & Co.

(Ex. C). Like the earlier definition, this "address" does not pertain to a specific location. Also, it is not clear to what the phrase "and/or others" relates. On one hand, it could mean a "location"

formerly owned by KDC or others, i.e., one location regardless of who owned it previously. On the other, it could mean a "mining location" ***and*** others, i.e., one specific mining location previously owned by KDC and any number of other locations. Moreover, the phrase "now owned and/or controlled" is undefined and vague. Grace does not own any land in the vicinity of the Zonolite Mountain in Libby, Montana, and the access agreements provide no definition of "controlled."

All of these vague elements combine to achieve a startling result. Under a broad reading, the access agreements could grant EPA access to enter and dispose contaminated wastes at ***any*** property owned and/or "controlled" by Grace, anywhere in the world.

Although the third August 3 proposed access agreement provides more detail than the others, it is still impermissibly vague. It contains the following "address:"

> All property owned or formerly owned by Kootenai Development Corporation and/or others, which is now owned and/or controlled by W.R. Grace & Co., located on or near the Screening Plant area of the Libby Asbestos Site (BC), as shown on the attached map.

(Ex. C). Like the previous "address," this one does not define the phrase "owned and/or controlled." It also contains the vague word "near." Near could mean adjacent to, in the vicinity of, or even in the same state as. Thus the access agreement KDC has no way of knowing exactly on what property EPA plans – or may later plan – to dispose of contaminated waste. It is also unclear whether the attached map depicts the land on which EPA seeks access or the area "near" which it seeks access. Quite possibly, the access agreements could allow EPA to dispose contaminated waste on all of KDC's property, and all property KDC should subsequently own! EPA's demands for access under such vague agreements is undoubtedly arbitrary, capricious, and an abuse of discretion.

3. EPA's Entry to Effectuate a Response Action Must Be Tied to a Response Action at That Location.

Section 104(e)(3) authorizes EPA access to property to "effectuate a response action." EPA claims that disposing of contaminated waste at the Mine Site is needed to effectuate a response action. The waste, however, is not related to a response action at the Mine Site or property adjacent to the Mine Site.[7] In fact, EPA has made no determination regarding the necessity for any response action at the Mine Site. Rather, EPA seeks access to the Mine Site to dispose of wastes generated from a response action ***at another site***. This request goes beyond EPA's statutory authority and is thus arbitrary and capricious, an abuse of discretion, and contrary to law.

EPA's request goes beyond the scope of Section 104(e). Section 104(e)(1) expressly limits EPA's authority as follows:

> Action authorized.
>
> [EPA] is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4).

42 U.S.C. § 9604(e)(1). As the plain language indicates, Congress designed Section 104(e) to allow EPA access to property at which it has initiated a response action, and adjacent properties, ***to effectuate that response***. EPA, however, attempts to twist the statute to grant itself authority to dispose of waste generated from a particular response action at almost any other location regardless of its relationship, if any, to the facility subject to the release.

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[7] EPA may attempt to portray its actions as simply returning to KDC's land what was once removed. Although material from the mine had been taken to the Screening Plant, that is far from the whole story. For six years, the Screening Plant has been the location of an active business and nursery. (Ex. K ¶ 4). Thus the soil might harbor any number of contaminants unrelated to KDC or Grace activity, including pesticides, herbicides, construction debris, or petroleum hydrocarbons. Moreover, EPA has excavated vermiculite from underneath Native American artifacts buried 7,000 years ago, demonstrating that some contaminants are naturally occurring. (Ex. K, ¶ 6).

EPA's interpretation carries with it grave consequences. If EPA is correct, then Section 104(e) authorizes EPA access to effectuate a response action from the Screening Plant in Libby, Montana – including the disposal of contaminated waste – ***virtually anywhere across the country***, presumably including private residences, local water supplies, and even school playgrounds. Section 104(e) should not and does not confer such authority upon EPA. Rather, the section limits EPA's access "to effectuate a response action" to the property at which the EPA has initiated the response action and adjacent properties necessary for the conduct of the response action. Cf., e.g., United States v. Mountaineer Ref. Co., 886 F. Supp. 824, 825 (D. Wyo. 1995) (ordering EPA access to property subject to removal action to conduct that removal action); New Jersey Dep't of Envtl. Protection v. Briar Lake Dev. Corp., 736 F. Supp. 62, 63 (D.N.J. 1990) (ordering EPA access to land adjacent to property subject to response action to conduct that response action).

Other courts have rejected similar arguments made by EPA. In United States v. Tarkowski, 2000 U.S. Dist. LEXIS 7393, (Ex. L), for example, EPA sought access to private property to investigate a release or threatened release of a hazardous substance. The court determined that EPA had a reasonable basis to believe that a release had occurred or may have been threatened on several particular areas of the landowner's property. See Tarkowski, 2000 U.S. Dist. LEXIS 7393, at *3. EPA's request for access, however, extended far beyond investigating the release or suspected releases. Instead, EPA sought comprehensive access to the entire property for investigation and sampling, including subsurface investigation. See Tarkowski, 2000 U.S. Dist. LEXIS 7393, at *7-8.

The court refused to grant EPA's motion for an order in aid of access, stating:

> [T]he request for access in the government's second motion goes vastly beyond what would be called for by the Court's findings concerning the nature of the releases or threatened releases that the EPA has a reasonable basis to believe have occurred or may occur on [the Defendant's] property . . . . Nor is there any indication that the EPA's activity would be limited to the particular areas of [the

> Defendant's] property where the Court has concluded that the EPA has a reasonable basis to believe that a release within the meaning of the statute has occurred or may be threatened to occur.

Tarkowski, 2000 U.S. Dist. LEXIS 7393, at *7,*9. Although EPA had a reasonable basis to believe a release had occurred, the court held that CERCLA did not grant EPA carte blanche to conduct whatever investigation it pleased. Rather, CERCLA limits the scope of EPA's investigation and sampling activities based on EPA's reasonable belief of a release. See Tarkowski., 2000 U.S. Dist. LEXIS 7393.

The same logic holds here. If EPA seeks access to effectuate a response action, the access must be tied to a response action on that particular land. In fact, EPA's instant demand presents an even more compelling case: it seeks access both to dispose of waste and effect a yet-to-be-determined response action. Such access is much more intrusive than the investigation and sampling in Tarkowski, warranting at least as much scrutiny.

EPA's demands for entry to effectuate a response action and waste disposal at the Mine Site are unrelated to any response action at the Mine Site or adjacent property. The demands thus exceed EPA's statutory authority and are arbitrary and capricious, an abuse of discretion, and contrary to law.

4. CERCLA § 104(e) Allows Only for Entry "At Reasonable Times" and Not Permanent Entry Without Limitation.

CERCLA § 104(e) states that EPA "is authorized to enter [property] ***at reasonable times*** . . ." 42 U.S.C. § 9604(e)(3) (emphasis added). All four of EPA's proposed agreements, however, contain no such restriction. Instead, each agreement grants EPA "continued access," allowing EPA entry onto KDC's property, without notice, at any time and for any length of time. Such unlimited access is in no way restricted to "reasonable times." Cf. In re Sharon Steel Corp., No. RCRA-III-062-CA, 1994 EPA RJO LEXIS 16 (Feb. 9, 1994) (stating that entry "at reasonable times" under RCRA order normally requires compliance with plant owner's visitor policy).

Moreover, EPA's internal policies interpret "reasonable times" to mean normal business hours. As stated in a June 5, 1987 policy memorandum regarding access for response and civil enforcement activities under CERCLA, (Ex. G, ¶ IV):

> EPA personnel should arrive at the site at a reasonable time of day under the circumstances. In most instances this will mean during normal working hours.

CERCLA's plain language, court decisions, and EPA's own internal policies all show that, by requesting open-ended access to KDC's property, EPA has exceeded its statutory authority. EPA's access requests are therefore arbitrary and capricious, an abuse of discretion, and contrary to law.

5. **EPA Does Not "Need" to Dispose of Contaminated Waste on KDC's Property.**

Section 104(e) allows EPA access authority only "where entry is ***needed*** . . . to effectuate a response action." 42 U.S.C. § 9604(e)(3)(D) (emphasis added); Briar Lake Dev. Corp., 736 F. Supp. at 66.

In Briar Lake, for example, EPA initiated a response action on land adjacent to the defendant's property. EPA sought immediate access to the defendant's property to effectuate the adjacent response action, alleging "[f]urther remediation work cannot continue until the sediments in [the defendant's] property are excavated," and "failure to gain access will cause the remediation to stop." Briar Lake Dev. Corp., 736 F. Supp. at 64. The court granted EPA's request for immediate access because "access [was] needed to effectuate the response at the adjacent . . . landfill." Briar Lake Dev. Corp., 736 F. Supp. at 66.

In this case, however, EPA in no way "needs" to dispose of waste on KDC's property. The EPA, in its Action Memorandum for the Screening Facility (Attached to the Complaint as Attachment 1 to Declaration of Paul R. Peronard), states that the Mine Site is only one obvious location for disposing waste from the Screening Facility:

> Proposed action description
> * * *

d. Excavation of contaminated soil, debris, and vermiculite
e. Preparation of disposal location at the mine, ***or other appropriate disposal location***.
f. Transportation and disposal of waste

Peronard Dec. Attachment 1, ¶ VI(A)(1) (emphasis added).

Moreover, in numerous conversations with KDC and Grace regarding waste at the Export Plant in Libby, Montana, EPA has stated repeatedly that a landfill in Spokane, Washington is a viable and acceptable alternative. In fact, EPA admits the viability of using the Spokane landfill, but merely states that it is less convenient and more expensive. (Pl.'s Memo., Ex. 1, ¶ 20(a)). EPA also stated, in a July 26, 2000 letter to counsel for Defendants, that "it is EPA's ***preference*** that the mine site be used as a repository" for Screening Facility Waste. (Ex. I, p. 7) (emphasis added). Section 104(e), however, does not grant entry "when convenient" to effectuate a response action, but only "when needed." EPA's entry demand is thus arbitrary and capricious, an abuse of discretion, and contrary to law.

6. EPA Has Not Initiated a Response Action at the Mine Site.

In its various proposed access agreements, EPA has demanded access for "[t]he taking of a response action" at the Libby Mine Site. (Ex. A). The EPA, however, has made no determination that a response action is necessary at the Mine site. It appears that EPA demands unfettered access to the Mine based solely on the possibility that it might later determine a response action necessary. EPA's attempt to order access without a demonstrated need is outside the scope of Section 104(e) and meets the very definition of arbitrary.[8] Cf., e.g., Mountaineer Ref. Co., 886 F. Supp. at 825 (ordering EPA access to property subject to removal action to conduct that removal action); Briar Lake Dev. Corp., 736 F. Supp. at 63 (ordering EPA access to land adjacent to property subject to response action to conduct that response action).

[8] Webster's Third New International Dictionary (unabridged) defines arbitrary as "arising from unrestrained exercise of the will, caprice, or personal preference," and "based on random or convenient selection or choice rather than on reason or nature."

B. KDC Has Not Obstructed EPA's Right of Entry.

EPA must also show that KDC[9] has obstructed EPA's right of entry. KDC, however, has granted EPA access to take samples, conduct investigations, and oversee activities on the property. EPA claims, however, that it has a right to enter the property and dispose of contaminated waste. As discussed above in Parts I(1) and I(3), Section 104(e) does not authorize EPA to acquire private property for contaminated waste disposal. Rather, EPA must act pursuant to Section 104(j), explicitly authorizing EPA to acquire property in limited circumstances and through limited means. Moreover, Section 104(e) does not allow EPA entry onto any property to effectuate a response action. Access under Section 104(e) must be tied to a response action at the location where EPA seeks entry. In this case, however, the contaminated waste EPA seeks to dispose of has no relation to any cleanup action on the Mine Site.

EPA relies on a single, inapposite case. United States v. City of New Orleans, 86 F. Supp. 2d 580 (E.D. La. 1999), wherein EPA sent two access agreements to the City of New Orleans. The City, however, never responded. After notifying the City that EPA had statutory authority to secure access, the City sent EPA a letter unequivocally denying access. The EPA then issued a Unilateral Administrative Order, to which the City responded by filing a complaint for a preliminary and permanent injunction preventing EPA from conducting response efforts. See City of New Orleans, 86 F. Supp. 2d at 582.

Unlike the defendant in City of New Orleans, KDC has granted access to EPA for investigation and sampling and offered to negotiate access for waste disposal and other activities. KDC seeks merely to reach reasonable implementation terms, and has made numerous attempts to negotiate a comprehensive access agreement – as recently as September 12, 2000, two days before EPA filed this action. (Ex. H). Moreover, because EPA does not have the "right" to enter

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[9] Because Grace does not own the property, it cannot obstruct EPA's right of entry under CERCLA § 104(e)(5)(A) and (B)(i).

KDC's property and dispose of contaminated waste, KDC's request to does not obstruct EPA's right of entry.

C. EPA Seeks Entry Unauthorized by CERCLA § 104(e).

EPA cannot compel compliance unless it seeks entry specifically authorized by Section 104(e)(2), (3), or (4). As discussed above, Section 104(e) does not authorize EPA to acquire private property for contaminated waste disposal. Also, Section 104(e) does not allow EPA entry onto any property to effectuate a response action. Thus EPA seeks to compel access unauthorized by CERCLA § 104(e). That it cannot do.

IV. CONCLUSION

EPA began this ordeal on July 19, 2000 by demanding an immediate response to a vague and unreasonable access demand that, in reality, constituted a license to dispose of contaminated waste on private property. Since that date, KDC has made reasonable, good-faith efforts to negotiate with EPA and arrive at a mutually agreeable solution. In fact, KDC is willing to enter into either private or court-sanctioned mediation to achieve a speedy resolution. EPA's current requests for access and waste disposal, however, exceed its statutory authority. They are thus arbitrary and capricious, an abuse of discretion, and contrary to law. The Court should deny EPA's motion.

DATED this 2nd day of October, 2000.

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CERTIFICATE OF MAILING

I, Lisa Driscoll, an employee of the law firm of GARLINGTON, LOHN & ROBINSON, PLLP, hereby certify that on this 2nd day of October, 2000, I mailed a true copy of the **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR AN ORDER IN AID OF IMMEDIATE ACCESS OR IN THE ALTERNATIVE FOR AN EXPEDITED HEARING** postage prepaid to the following:

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